Central Law Journal.

ESTABLISHED JANUARY, 18[illegible]

VOL. 76 ST. LOUIS, MO., MARCH 7, 1913. No. 10

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A COURT FOR RECALL AND REMOVAL OF JUDGES.

It is admitted, or asserted, accordingly as said by opponents or advocates of recall of judges, that the proposal therefor is not to be dismissed as a temporary manifestation of popular prejudice. As said by Mr. Henry W. Taft, in a notable address before the New York State Bar Association, on Jan. 24th, 1913: "We must not fail to deal with it seriously, because it appeals to many people sincerely seeking to improve social and industrial conditions."

When, in addition, so many admit that our judicial administration is very faulty and progressively tending less to command that higher professional ability which is imperative for the successful working even of a perfect judicial administration, the general people naturally become restless.

The judicial department, while claiming that it must be independent, if its duties are to be performed satisfactorily, yet also touches the interest of the people more nearly than any other. It affects them both generally and particularly. It concerns the liberty and property of individuals and daily relies upon the people for sacrifices. It calls them to its bar as witnesses and appeals to their sense of justice. Not only parties litigant—and each of them is liable to be such at any time—suffer from its delays and imperfections, but any expense and injustice of judicial administration is brought into the open, every day.

Therefore, we hear a great deal of the inefficiency of our courts, while, though there may be inefficiency in the executive branch of our government, this may not come to the public's attention. Do we hear anything of the recall being applied to other officials? As to them, it is a mere principle, and though many of us believe it not objectionable as so applied, yet we know of no clamor for its being utilized in this way. Delinquency, or alleged delinquency by any other than a judge excites no special interest and, certainly, no animosity. But, if a judge's decision or his tyranny or his bad habits offend, people may arise in their fury to put him out of office. Indeed, it is fury more than anything else that is the chief factor in recall.

But an evolution about which we have in mind is found in a proposal before the Minnesota Legislature to amend the Constitution of that State so as to provide for "A Court for Recall and Removal of Judges." This proposal is that: "The Legislature shall have power by majority vote to establish and provide for a court for the recall and removal of judges, to consist of such number of persons elected or appointed or constituted in such a manner as may be provided by law. Said court shall have jurisdiction to recall and remove from office any judge of any court of this state for any cause for which impeachment would lie, or for incompetency, misconduct or any cause of recall or removal which may be provided by law."

The proposed amendment also provides that this shall not be exclusive of the power of impeachment by the legislature, that a jury may be called to try questions of fact and acquittal shall not bar any prosecution of any judge as an individual, nor any conviction have any force except upon the single issue before the court.

This proposal seems so very fair, that we would be at a loss to state how any reasonable objection could be made to it even by the most ardent advocate of the recall of judges. It would be a resort to procedure which would accord with the dignity of the question to be decided. It would give an accused judge an opportunity to defend himself against responsible accusation in a proper way, and all of this without the court being dragged into the mire of a political hustings.

It would do more than this. It would prevent enemies, made so by the judge's

course as a judge, wreaking their vengeance upon him, when he would be claiming, that his course had been one of strict consistency with his obligation to duty.

Furthermore, it would put the people on an equality, or more nearly on an equality, as to their right to procure a judge's removal through recall, than if the whole electorate were appealed to against him. Everyone knows, that, if charges were made against a judge and not followed up by a vigorous campaigning and appeals to passion, they would die from inanition of interest. One making them must justify himself for doing so, and he must have money and influence to do this.

The consequence of all this would be, that, if the charges should happen to be false, a verdict either way would leave one's reputation blasted forever. What high-minded man, assailed as a judge and sustained merely by a majority of the voters, would care to remain in an office, where his integrity or competency had been so fiercely attacked and so narrowly saved? And who does not know, that a judge, who is more a shifty politician than an independently courageous official, would have a better chance to come out the victor?

The best feature, however, of a court for recall would be, that an accused judge would not have to fight rumors, unsworn statements, elusive slanders and personal prejudices, but he would be called upon to meet evidence with evidence and those who pass on the issue would be upon their oaths just as they are in disposing even of far less serious questions. Shall an accused judge not have as full and fair a trial as a vagrant or a petty thief?

About the only reason there is in agitation for recall of judges is that impeachment is cumbersome and the people cannot initiate it. But by such an amendment as is above shown, the procedure could be vastly simplified, made expeditious and brought into exercise outside of legislative bodies. Appeal to the general electorate involves turmoil, expense, and fully as much delay while judgment is not based on well-ascertained facts.

Such a court as is proposed would be a salutary check, while the right to invoke a general vote would be to place a rod in the hands of dissatisfied members of the general body politic. This court would tend to make a judge seek to enforce the rule of right as his defense against attack. To defend himself against the people at large he must ingratiate himself with the influential units thereof—those who will be personally interested in standing by him against attack from any and every source. If his impartiality attracts no one in particular, he might seem to be without friends.

Above all, a court of recall is American, because it gives to the accused an opportunity to defend himself, while, in appeal to the people, thousands must judge of his guilt or innocence from conflicting rumors, indefinite accusations, founded possibly on ignorance or prejudice. Who would wish to condemn anyone on such evidence? And, yet, who would not wish a judge removed, if one tithe of what would be said against him were true? Would not every sincere, serious citizen revolt at the duty thrust upon him to decide such an issue? If this differs in any way from Lynch law, it is merely in its being less expeditious.

NOTES OF IMPORTANT DECISIONS

MUNICIPAL CORPORATIONS—LIABILITY FOR INJURY FROM PLAYING OF BASEBALL ON STREETS.—In Goodwin v. Town of Reidsville, 76 S. E. 232, decided by Supreme Court of North Carolina, it was held that, as it was a governmental duty on the part of a city to keep its streets free from danger by acts and conduct of others, a pedestrian injured by boys playing baseball thereon, as permitted by the police, had no right of action against the city. The opinion cites many cases where injury resulted to the user of the street, such as from horse racing, Martin v. Kingfisher, 22 Okl. 602, 98 Pac. 436, 18 L. R. A. (N. S.) 1238; sled coasting, Dudley v. Flemingsburg, 115 Ky. 5, 72 S. W. 327, 60 L. R. A.

575, 103 Am. St. Rep. 253; firing cannon on the streets, without authority, Norristown v. Fitzpatrick, 94 Pa. 121, 39 Am. Rep. 771. There is also an elaborate note on this subject at page 639 of 23 L. R. A., N. S. The subject is also treated with reference to parks in 66 Cent. L. J. 463-469.

The instant case goes upon the theory that a city cannot be made liable for tortious acts of individuals on the streets; but does that principle fully apply? Shall dangerous sports or celebrations with fireworks of which the city has full notice in advance or even expressly or tacitly authorizes come under that rule? Are they not like obstructions in a street which render its use dangerous? There is here not merely human conduct, but it is like an individual putting something in a street and continuing it there, so as to make the street unsafe.

In 74 Cent. L. J. 74 we considered a case by Indiana Appellate Court which thought that a city might be made liable for a fireworks display in one of its squares causing injury, where there was special permission to hold it. Moore v. City of Bloomington, 95 N. E. 374. The condition of liability was in whether or not "the fireworks as authorized and conducted constituted a nuisance." This seems nearer the situation we suggested. Human conduct is eliminated or not deemed the necessarily controlling factor. We doubt whether express authorization has anything to do with the question. A nuisance in a street is a nuisance whether by express or tacit permission.

THE CONSTITUTIONAL RIGHT OF SECESSION.*

Secession.—Fifty years have passed since the Southern States adopted ordinances of secession, and it would seem that a sufficient length of time has elapsed to discuss such right unbiased by sectional prejudice, especially when the sole object is truth, and there is a firm conviction that the result determined by the arbitrament of the sword will in no wise be changed by any views now expressed.

Since the war with Spain, when soldiers from the North, South, East and West stood shoulder to shoulder in battle array, fighting for our country—since the time when generals who had commanded Federal troops during the War Between the States took charge of soldiers whose fathers had fought for the Confederacy, and generals who had won their spurs battling in behalf of the South commanded troops from the other sections of the Union—no lover of peace can longer entertain a doubt that we are, happily, an united people, and that with one accord and a common pride, we salute the Stars and Stripes as the flag of our country.

It surely will be gratifying not only to the people of the South but to fair-minded persons everywhere, in search of truth, if we can demonstrate that the States were acting within their legal rights when they adopted the ordinances of secession.

Initial Steps.—The ordinance passed by the people of South Carolina, in convention assembled, was styled "An ordinance to dissolve the Union, between the State of South Carolina and other States united with her under the compact, entitled "The Constitution of the United States of America,'" and declared: "That the ordinance adopted by us in convention on the 23rd day of May, in the year of our Lord one thousand seven hundred and eighty-eight, whereby the constitution of the United States of America was ratified, and also all acts and parts of acts of the general assembly of this State, ratifying amendments of the said constitution, are hereby repealed, and that the Union now subsisting between South Carolina and other States, under the name of the United States of America, is hereby dissolved."

Similar ordinances were adopted by the other seceding States.

When the American colonies determined to dissolve their political connection with Great Britain, they sent their representatives to a general congress of those colonies, who declared that they were and of right ought to be "free and independent States."

They successfully resisted the effort to reduce them to submission and their separate independence was recognized—each State under its own name and not as one of a group or nation.

The second of the "Articles of Confederation" was in these words: "Each State retains its sovereignty, freedom and independence and every power, jurisdiction and right which is not by this confederation expressly delegated to the

*Some time ago (75 C. L. J. 223) we published an article by Mr. Coutts, (of Sault Ste. Marie, Mich.) on "Sovereignty," which denied the doctrine of 'State's Rights," including the right to secede. Judge Eugene B. Gary, of the Supreme Court of South Carolina, sends us the following interesting arguments in reply.—Ed.

United States in congress assembled," thus showing that the States did not, then, surrender their sovereignty.

The articles of confederation were adopted by 11 of the original States in 1778 and by the other two shortly afterward, and continued in force until 1789.

Congress Governed.—During that period the general government was vested in congress alone, in which each State had an equal vote upon all questions involved. All executive as well as legislative powers delegated by the States were exercised by congress.

When not in session a committee of the States, consisting of one delegate from each State, had general management of governmental affairs. Provision was made for the creation of courts having jurisdiction in admiralty cases and in the settlement of controversies between two or more States. It became necessary to reorganize that government on account of the increased commercial intercourse of the States with one another and with foreign countries and for making provision for the payment of the public debt, contracted during the War of Independence. As a consequence there was a proposition for a meeting of commissioners from the various States, which was held at Annapolis in 1786; but as only five States were represented they declined to take any further action than to recommend another convention with more extensive powers. As expressed by them, it was their "unanimous conviction that it may essentially tend to advance the interests of the Union if the States by whom they have been respectively delegated would themselves concur and use their endeavors to procure the concurrence of the other States in the appointment of commissioners to meet at Philadelphia on the second Monday in May next, to take into consideration the situation of the United States, to devise such further provisions as shall appear to them necessary to render the constitution of the federal government adequate to the exigencies of the Union, and to report such an act for that purpose to the United States in congress assembled, as, when agreed to by them and afterward confirmed by the legislatures of every State will effectually provide for the same."

Convention of Delegates.—On February 21, 1787, congress adopted the following resolution:

"Resolved, That in the opinion of congress it is expedient that, on the second Monday in May, next, a convention of delegates, who shall have been appointed by the several States, be held at Philadelphia for the sole and express purpose of revising the articles of confederation and reporting to congress and the several legislatures such alterations and provisions therein as shall, when agreed to in congress and confirmed by the States, render the federal constitution adequate to the exigencies of government and the preservation of the Union."

Luther Martin, a delegate to the convention from Maryland, in an address delivered before the legislature of that State, thus classified the differences among the members of the convention:

"It may be proper to inform you that on object and wish it was to abolish and annihilate all State governments, and to bring forward one general government, over this extensive continent, of a monarchial nature, under certain restrictions and limitations. Those who openly avowed this sentiment were, it is true, but few; yet, it is equally true, sir, that there was a considerable number who did not openly avow it, who were by myself, and many others of the convention considered as being in reality, favorers of that sentiment; and, acting upon those principles, covertly endeavoring to carry into effect what they well knew openly and avowedly could not be accomplished.

"The second party was not for abolition of the State governments, nor for the introduction of a monarchial government under any form; but they wished to establish such a system as could give their own States undue power and influence in the government over other States.

"A third party was what I considered truly federal and republican; this party was nearly equal in number with the other two, and was composed of the delegates from Connecticut, New York, New Jersey, Delaware, and, in part, from Maryland, also of some individuals from other representations. This party, sir, were for proceeding upon terms of federal equality; they were for taking our present federal system as a basis of their proceedings, and, as far as experience had shown, that other powers were necessary to the federal government, to give those powers. * * * They considered this the object for which they were sent by their States, and what

their States expected from them. But, sir, the favorers of monarchy, and those who wished the total abolition of State governments, well knowing that a government founded on truly federal principles, the basis of which were the thirteen State governments, preserved in full force and energy, would be destructive of their views; and, knowing that they were too weak in numbers openly to bring forward their system, conscious also that the people of America, would reject it, if proposed to them, joined their interests with that party, who wished a system, giving particular States the power and influence over the others, procuring in return mutual sacrifices from them, in giving the government the great and undefined powers as to its legislative and executive, well, knowing, that departing from a federal system, they paved the way for their favorite object, the destruction of the State governments and the introduction of monrchy."

The majority of the members of the convention, however, endeavored to distribute powers of the government in such a manner that the interest of one section of the country would be protected by a check upon the other. It was believed that this would be accomplished by an equal vote in the senate, and by providing for representation in the house, in proportion to population, estimating the negroes as equal to three-fifths of the same number of whites, and that this would soon have the effect of giving to the South a majority in the house, while the North would retain its ascendency in the senate.

Hot Contest Arose.—Time will not permit us to state at length the hot contests that arose in the convention of the several States, on account of the careful manner in which they endeavored to guard the rights of the States.

We, however, reproduce the declaration of principles, accompanying the ratification by the State of New York, which was as follows: "That the powers of government may be reassumed by the people, whenever it shall become necessary to their happiness; that every power, jurisdiction and right which is not by the said convention, clearly delegated to the congress of the United States, or the departments of the government thereof, remains to the people of the several States, or to their respective State governments, to whom they may have granted the same; and that those clauses in the said constitution which declare that congress shall not have or exercise certain powers, do not imply that congress is entitled to any powers not given by the said constitution, but such clauses are to be construed either as exceptions to certain specified powers or as inserted for greater caution."

During the progress of the convention, a serious difficulty was forseen. The articles of confederation, under which the States were then united, contained this provision: "The articles of this confederation shall be inviolably observed by every State, and the union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them, unless such alteration be agreed to in a congress of the United States, and be afterward confirmed by the legislature of every State."

Consent of All States.—It will thus be seen that the consent of every State legislature was requisite for final ratification, and as Rhode Island had declined to send delegates and two of New York's three delegates had withdrawn from the convention, it was doubtful whether such consent could be obtained. In order to obviate this difficulty, the members of the convention took the responsibility of transcending their instructions by introducing article 7 into the new constitution, which provides that "the ratification of the conventions of nine States shall be sufficient for the establishment of this constitution between the States so ratifying the same."

There was another reason for referring the constitution to the conventions, composed of delegates elected by the people for that purpose. Mr. Madison, in the Federalist, says: "It has been heretofore noted among the defects of the confederation that in many of the States it had received no higher sanction than a mere legislative ratification."

It was to cure this defect, and for an additional reason that the articles of confederation only acted upon the States, whereas the new constitution was not only intended to limit the powers of the States in the manner therein provided, but to act directly upon the individual citizen in certain respects.

The Legal Right.—With these preliminary words, we come to a discussion of the question, whether the States had the legal right to secede.

The controversy with regard to this question arose out of the following provisions of the constitution: (1) the preamble; (2) article 3; (3) article 6, and (4) the tenth amendment.

We will first discuss the proper interpretation of the words: "We the people of the United States" in the preamble, which was as follows: "We the people of the United States in order to form a more perfect Union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the United States of America."

Mr. Webster, during his famous debate with Mr. Hayne in 1830, said: "It can not be shown that the constitution is a compact between State governments. The constitution itself, in its very front, refutes that proposition: It declares that it is ordained and established by the people of the United States. So far from saying that it is established by the governments of the several States, it does not even say that it is established by the people of the several States; but it pronounces that it is established by the people of the United States in the aggregate."

Mr. Everett, in an address, used this language with reference to the constitution:

"That instrument does not purport to be a 'compact,' but a constitution of government. It appears, in its first sentence, not to have been entered into by the States but to have been ordained and established by the people of the United States for themselves and their 'posterity.' The States are not named in it; nearly all the characteristic powers of sovereignty are expressly granted to the general government and expressly prohibited to the States."

Not a Compact.—John Lothrop Motley, afterwards minister to the court of St. James, in a letter addressed to the London Times in 1861, thus expresses his views:

"It was not a compact. Whoever heard of a compact to which there were no parties? Or whoever heard of a compact made by a single party with himself? Yet the name of no State is mentioned in the whole document; the States themselves are only mentioned to receive commands or prohibitions; and the 'people of the United States' is the single party by whom alone the instrument is executed.

"The constitution was not drawn up by the States, it was not promulgated in the name of the States, it was not ratified by the States. The States never acceded to it, and possess no power to secede from it. It was 'ordained and established' over the States by a power superior to the States by the people of the whole land in their aggregate capacity."

If such a proposition had come before the courts in an ordinary case, we venture the opinion that it would scarcely have been deemed necessary to assign reasons to show that it was untenable.

At the time the constitution was submitted for ratification, the States were, severally, in full possession of their sovereign powers. Neither the congress created by the States under the articles of confederation nor the convention composed of delegates elected under the resolution passed by congress had the power to submit the constitution to the people in the aggregate for ratification, as it involved a structural change in the very foundations upon which the State government rested; there was no organization of the people in the aggregate for governmental purposes, and such change of governments could be made only by the consent of each State.

The resolution just mentioned provided for a convention "for the sole and express purpose of revising the articles of confederation and reporting to congress and the several legislatures such alterations and provisions therein, as shall, when agreed to in congress and confirmed by the States, render the federal constitution adequate to the exigencies of government and the preservation of the Union."

It was obviously necessary for the people in the aggregate to be organized into a political body with well defined powers and territorial limits, extending over the entire country, then under the jurisdiction of the State governments, otherwise they were not in a position to take part in the ratification of the constitution, even if the States had given their consent.

"We the People."—"We the people" clearly referred to the people of the respective States and not in the aggregate, as they alone had the power to ratify. "The people in the aggregate" could not ratify until they received the power for that purpose in some one of the modes in which a nation becomes possessed of sovereignty.

Furthermore it made no difference, even if the preamble did refer to the people in the aggregate, as the constitution was, as matter of fact, submitted to the people of the States. It took just such a course in its ratification as should have been pursued if the preamble had provided in express terms that it was to be submitted to the people of the State and not to the people in the aggregate.

"If the convention of 1787 had expressly declared that the constitution was (to be) ordained by 'the people of the United States in the aggregate,' or by the people of America as one nation, this would not have destroyed the fact that it was ratified by each State for itself, but that each State was bound only by its own voluntary act." (Bledsoe.)

It must be remembered that there never has been even an attempt to hold an election by the people in the aggregate, nor to declare the result of such an election.

The concluding clause of the constitution was in these words: "Done in convention by the unanimous consent of the States present, the 17th day of September in the year of our Lord one thousand seven hundred and eighty-seven, and of the Independence of the United States of America, the Twelfth." Thus showing that the constitution was not submitted by the people in the aggregate, as the people in the preamble and the people in the concluding clause were necessarily the same, and that even if the constitution had any force whatever before ratification, it was not intended to be the work of the people in the aggregate, but by the States.

Preamble Descriptive.—The preamble merely meant to describe those who were submitting the constitution for ratification, and if the description was erroneous it could not have the effect of determining the question, whether "the Union was composed of States as distinct communities, or a mere aggregation of the American people, as a mass of individuals."

In no view can it be successfully contended that the convention had power, both to create a political organization composed of the people in the aggregate and at the same time submit the constitution to them for ratification.

It must also be remembered that the words "We the people of the United States" were in the preamble. It, of course, could not, nor did it undertake to surrender, any of the rights of the State; those words were merely formal and descriptive of those who were submitting the constitution and not those to whom it was referred.

When the words of a writing are susceptible of different interpretations, one of which is consistent with other parts thereof, and also in accordance with the law, courts will, if possible, place such construction upon them.

Not Submitted to Votes.—If there had been a submission to the people in the aggregate, then it would have been necessary for a majority of the votes to be cast in favor of ratification. At that period the States of Virginia, Pennsylvania, North Carolina and Massachusetts exceeded in population all the others combined, yet if a larger number in those four States than in all the others collectively had voted for ratification it would not have had any effect upon the other States, unless there was a majority also in each of them. For while a majority of the people in the aggregate might have been in favor of ratification, there would not have been a compliance with the requirements of the constitution unless nine States had so declared.

The action of Rhode Island and that of the general government after it had refused, by a direct vote of the people, to ratify the constitution, show that they did not regard either the words "the people of the United States" or the ratification by the other States as having any binding force upon that State.

After the refusal of Rhode Island to ratify the constitution and after George Washington had been inaugurated as president of the United States, the governor of that State, at the request of its general assembly, addressed a communication to the president and to congress in which he said:

"Our not having acceded to or having adopted the new system of government formed and adopted by most of our sister States, we doubt not, has given uneasiness to them. That we have not seen our way clear to it, consistently with our idea of the principles upon which we all embarked, has also given pain to us. We have not doubted that we might thereby avoid present difficulties, but we have apprehended future mischief.

"Can it be thought strange that with these impressions that (the people of this State) should wait to see the proposed

system organized and in operation?—to see that further checks and securities would be agreed to and established by way of amendments before they could adopt it as a constitution of government for themselves and their posterity?

"We are induced to hope that we shall not be altogether considered as foreigners, having no particular affinity or connection with the United States."

The president, in formal language, transmitted the letter to congress, which did not contend that the preamble or the ratification by the other States was binding on Rhode Island.

"For the People.—Mr. Webster in his debate with Mr. Hayne, also said:

"It is, sir, the people's constitution, the people's government; made for the people, made by the people, and answerable to the people. The people of the United States have declared that this constitution shall be the supreme law. We must either admit the proposition or dispute their authority. The States are unquestionably sovereign, so far as their sovereignty is not affected by this supreme law.

"But the State legislatures, as political bodies, however sovereign, are yet not sovereign over the people.

"So far as the people have given power to the general government, so far the grant is unquestionably good, and the government holds of the people, and not of the State governments. We are all agents of the same supreme power, the people.

"The general government and the State governments derive their authority from the same source. Neither can, in relation to the other, be called primary, though one is definite and restricted, and the other general and residuary. The national government possesses those powers, which it can be shown the people have conferred on it, and no more.

"All the rest belong to the State governments or to the people themselves.

"So far as the people have restrained State sovereignty by the expression of their will in the constitution of the United States, so far, it must be admitted State sovereignty is effectually controlled. I do not contend that it is or ought to be controlled further."

It is evident that his views were based upon the proposition that the people of the States and the people of the United States or the people in the aggregate were one and the same.

The Distinction.—The people of the States, and the people of the United States as the representative of sovereignty are as distinct in a political way as if they were citizens of two different governments in no respect dependent upon each other.

The people of the United States, or the people in the aggregate, could not become vested with sovereign powers unless they were organized into a political body; nor could this be accomplished until the people of the respective States surrendered to the people of the United States their right, separately, to exercise ultimate power, sovereignty having been correctly defined as "a right of commanding, in the last resort, in civil society."

There were three modes by which the States ordinarily could determine any governmental question: (1) Through its legislature; (2) by a convention composed of delegates elected by the people, and (3) by direct vote of the people (as was the case when Rhode Island, in the first instance refused to ratify the constitution).

The foregoing proposition could not be sustained without leading to the conclusion that a State as such could not obtain the views of its people in two of these mode, to-wit: Either by their direct vote or by a convention, composed of delegates, elected by its people.

We have already shown that the resolution of congress, under which the convention met and the proceedings of the last named body, contemplated ratification by the direct vote of the people or by conventions composed of delegates elected by them.

If the words "the people of the United States" are disregarded, then there is nothing upon which even to base an argument that the action of the people in the several States was intended for any other purpose than to ascertain the will of the people of that particular State.

Mr. Webster also said:

"When the gentleman says the constitution is a compact between the States, he uses language exactly applicable to the old confederation. He speaks as if he were in congress before 1789. He describes fully that old state of things then existing. The confederation was, in strictness, a compact; the States, as States, were parties to it. We had no other general government. But that was found insufficient and inadequate to the public exigencies. The people were not satisfied

with it and undertook to establish a better. They undertook to form a general government, which should stand on a new basis—not a confederacy, not a league, not a compact between States, but a constitution."

Change Necessary.—This language clearly shows that when the States entered into the articles of confederation, they were united by a mere compact and therefore each State retained its sovereignty; that the people of a State could not become the people of the United States until there was a fundamental change in the sovereign powers of the States and that any political action on the part of the people within its borders could only be construed as affecting the rights of the State.

The preamble and the concluding clause must be construed together, when they will show that neither had reference to future action on the part of the people, but merely as to the proceedings of the convention in formulating the constitution. The ratification did not take place in pursuance of any provision of the constitution, and we must look to the resolution of congress under which the States sent delegates to the convention and to other proceedings of the last named body for the authority submitting it, which show that the only action contemplated was on the part of the States.

But the following facts leave no room for doubt as to the reason why the words, "We, the people of the United States," were inserted in the preamble.

The convention sat with closed doors and adopted the following rules:

"That no copy could be taken of any entry on the journal during the sitting of the house without leave of the house.

"That members only be permitted to inspect the journal.

"That nothing spoken in the house be printed or otherwise published or communicated without leave."

Gen. Washington, who was president of the convention and to whose custody the journal was intrusted, deposited it nine years afterward among the archives of the state department. It shows that the preamble was as follows when originally reported to the convention: "That the people of the States of New Hampshire, Massachusetts, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia do ordain, declare and establish the following constitution for the government of ourselves and our posterity."

The preamble as reported to the convention on August 6, 1787, was unanimously adopted next day, and it was amended, not for the purpose of submitting the constitution to the people in the aggregate, but because the convention could not tell, in advance, which of the States would ratify it.

As to "People."—The next question for consideration is the meaning of the word "people" in the 10th amendment, which was as follows:

"The powers not delegated to the United States, nor prohibited by it to the States, are reserved to the States respectively or to the people."

The word "people" in said amendment had reference to those who had granted the powers mentioned in the constitution. The preamble and this amendment referred to the same people, and as we have already discussed the proper interpretation of that word, when used in the preamble, we do not deem it necessary to add anything to what was then said.

Lastly we proceed to discuss the provisions of articles 3 and 6 of the constitution.

Mr. Webster in his speech hereinbefore mentioned, thus expressed his construction of these two provisions:

"There are in the constitution grants of powers to congress and restrictions on these powers. There are also prohibitions on the States. Some authority must, therefore, necessarily exist, having the ultimate jurisdiction to fix and ascertain the interpretation of these grants, restrictions and prohibitions. The constitution has itself pointed out, ordained and established that authority. How has it accomplished this great and essential end? By declaring, sir, that 'the constitution and the laws of the United States, made in pursuance thereof, shall be the supreme law of the land, anything in the constitution or laws of any State to the contrary notwithstanding.'

The First Move.—"This, sir, was the first great step. By this the supremacy of the constitution and laws of the United States is declared. The people so will it. No State law is to be valid which comes in conflict with the constitution of any law of the United States passed in pursuance

of it. But who shall decide this question of interference? To whom lies the last appeal? This, sir, the constitution itself decides also by declaring 'that the judicial power shall extend to all cases arising under the constitution and laws of the United States.' These two provisions, sir, cover the whole ground. They are in truth the keystone of the arch. With these it is a constitution; without them it is a confederacy."

Sovereignty has been correctly defined as "a right of commanding, in the last resort, in civic society."

If, therefore, there was a power that could change any law of the United States, or even the constitution itself, then it can not be successfully contended that ultimate power resided in the general government or in the people in the aggregate.

When Great Britain recognized the colonies separately, as free and independent States, each had the right to exercise all the sovereign powers of a nation.

One of the prerogatives of sovereignty is the right to resume all powers delegated by it whenever it may see fit, for the reason that a nation does not recognize a superior to whom it is responsible for its actions.

The only manner in which a nation can be deprived of such right, is either by conquest or by its consent and voluntary act. The States retained these rights unless they were surrendered when they ratified the constitution.

"Several sovereign and independent States may unite themselves together by a perpetual confederacy, without each in particular, ceasing to be a perfect State. They will form together a federal republic; the deliberations in common will offer no violence to the sovereignty of each member, though they may, in certain respects, put some restraint on the exercise of it in virtue of voluntary engagements. A person does not cease to be free and independent when he is obliged to fulfill the engagements into which he has very willingly entered." (Vattel.)

And the principle is also well settled that "a nation is not, without its consent, subject to the controlling action of any of its instrumentalities or agencies; the creature can not rule the creator."

Kansas v. Colorado, 27 Sup. Ct. Rep., 655.

Indeed we do not suppose that those principles are controverted by any publicist of note.

The Tenth Amendment.—The tenth amendment is in these words: "The powers not delegated to the United States by the convention nor prohibited by it to the States, are reserved to the States or to the people."

This amendment renders it encumbent on those asserting a grant of power by the States to show express authority for that purpose; none, however, has ever been shown. On the contrary, we contend that the express provisions of the constitution clearly show that ultimate power still resides with the States. Those who contend otherwise rely upon the ample powers conferred upon the general government, to show that the States surrendered their right to resume the powers granted by them. They contend that the right to exercise ultimate power did not reside in State governments, but in the general government as provided by the constitution through the instrumentalities therein mentioned, especially the judicial department.

Article 5 of the constitution, which is as follows, shows that this position is untenable.

"The congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two-thirds of the several States shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight, shall, in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the senate."

State Kept Rights.—The provisions of this article show that the States did not surrender their sovereignty and that ultimate power resides in them. On application by the legislatures of two-thirds of the States, congress shall call a convention for proposing amendments, which shall be valid when ratified by the legislatures of three-fourth of the sovereign

States, or by convention of three-fourths thereof, as the one or the other modes of ratification may be proposed by congress.

This article recognizes the powers of the States through their legislatures or by conventions to act severally and that three-fourths of the States may change the organic law upon which the general government rests. Every provision of the constitution except the provision that no State, without its consent, shall be deprived of equal suffrage in the senate, may be amended.

Three-fourths of the States can now by separate action amend the constitution, by inserting therein a provision that each State at its pleasure shall have the right to secede. It makes no difference what powers were delegated by a State, provided it did not surrender its right to exist as such, it may resume those powers at its pleasure, or may insert a provision declaratory of the law at variance with any decision rendered by the supreme court of the United States.

The people of the several States either surrendered their sovereignty to the people of the United States or delegated to the general government the right to exercise certain enumerated powers. Unless there was a clear intention on the part of of the States to surrender their sovereignty, it made no difference even if they granted all legislative, judicial and executive powers they could resume such powers whenever they saw fit.

State May Make Move.—The State may take the initiative through their legislatures. The duty imposed upon Congress in regard to the calling of the convention for proposing amendments is purely ministerial, and the other duty imposed upon congress, as to the mode of ratification, merely relates to the procedure and is ministerial in its nature, except as to its exercise or discretion in proposing ratification, either by the legislatures or by conventions in the several States.

The general government is powerless to prevent the States from making any changes they may see fit.

If the States had surrendered their sovereignty they could not exercise the powers mentioned in the said article, as they are inconsistent with such an idea. And, not having surrendered their sovereign powers, they had the legal right to resume those which they had delegated to the general government.

Our conclusion is sustained by those who were well qualified to express an opinion upon this question, as will be seen from the following quotations:

In answering Patrick Henry's objection to the wording of the preamble to the constitution, Mr. Madison used this language:

"Were it, as the gentleman (Mr. Henry) asserts, a consolidated government, the assent of a majority of the people would be sufficient for its establishment, and as a majority have adopted it already, the remaining States would be bound by the act of the majority, even if they unanimously reprobated it, were it such a government as is suggested, without having had the privilege of deliberating upon it."

Before the constitution was ratified he outlined its effect and the nature of the government thereby created, as follows:

"Were the people regarded in this transaction as forming one nation, the will of the majority of the whole people of the United States would bind the minority in the same manner as the majority. In each State, must bind the minority; and the will of the majority must be determined either by a comparison of the individual votes or by considering the will of a majority of the people of the United States. Neither of these has been adopted."

In the resolutions drawn by him and adopted in 1798 by the Virginia legislature, that State declared "that in case of a deliberate, palpable and dangerous exercise of other powers not granted by the said compact, the States who are parties thereto have the right, and are in duty bound, to interpose for arresting the progress of the evil and for maintaining within their respective limits the authorities, rights and liberties appertaining to them."

Advisory Convention.—After the constitution was framed and before it was ratified he said:

"It is time now to recollect that the powers (of the convention) were merely advisory and recommendatory; that they were so meant by the States and so understood by the convention, and that the latter have accordingly planned and proposed a constitution which is to be of no more consequence than the paper on which it is written unless it be stamped with the approbation of those to whom it is addressed."

In the famous resolutions drawn by Mr. Jefferson in 1798 and adopted with modi-

fications by the legislature of Kentucky, it was declared that "whensoever the general government assumes undelegated powers its acts are unauthoritative, void, and of on force; that to this compact each State acceded as a State and is an integral party; that this government, created by this compact, was not made the exclusive or final judge of the extent of the powers delegated to itself, since that would have made its discretion, and not the constitution, the measure of its powers; but that, as is all other cases of compact among parties, having no common judge, each party has an equal right to judge for itself as well of infractions as of the mode and measure of redress."

John Marshall, afterwards chief justice of the United States, in speaking of the power of the States over the militia, in the Virginia convention of 1788, is thus reported:

Power From People.—"The State governments did not derive their powers from the general government, but each government derived its powers from the people, and each was to act according to the powers given it. Would any gentleman deny this? * * * Could any man say that this power was not retained by the States, as they had not given it away? For (says he) does not a power remain till it is given away? The State legislatures had power to command and govern their militia before and have it still, undeniably, unless there be something in this constitution that takes it away. * * *"

Mr. Hamilton, in the 81st number of the series of political essays delivered by him, says:

"It is inherent in the nature of sovereignty not to be amenable to the suit of any individual without its consent. This is the general sense and the general practice of mankind, and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity, in the plan of the convention, it will remain with the States. * * * The contracts between a nation and individuals are only binding on the conscience of the sovereign and have no pretensions to a compulsive force. They confer no right of action, independent of the sovereign will.

In his speech at Capon Springs in 1851 Mr. Webster said:

"If the South were to violate any part of the constitution intentionally and systematically, and persist in so doing year after year, and no remedy could be had, would the North be any longer bound by the rest of it?

"And if the North were deliberately, habitually and of fixed purpose, to disregard one part of it, would the South be bound any longer to observe its other obligations?

"How absurd it is to suppose that, when different parties enter into a compact for certain purposes, either can disregard any one provision and expect, nevertheless, the other to observe the rest. * * *

"I have not hesitated to say, and I repeat, that if the Northern States refuse, wilfully and deliberately, to carry into effect that part of the constitution which respects the restoration of fugitive slaves and congress provide no remedy, the South would no longer be bound to observe the compact. A bargain can not be broken on one side and still bind the other side."

John Quincy Adams, in an address before the New York Historical society in 1839, expressed these views:

"To the people alone is there reserved, as well the dissolving as the constituent power, and that power can be exercised by them only under the tie of conscience, binding them to the retributive justice of heaven.

Where Rights Were Vested.—"With these qualifications, we may admit the same right as vested in the people of every State in the Union with reference to the general government, which was exercised by the people of the united colonies with reference to the supreme head of the British empire, of which they formed a part; and under these limitations have the people of each State in the Union a right to secede from the confederated Union itself."

To recapitulate, the main propositions upon which we rely are as follows:

1. That when the convention met in 1787, the several States were in full possession of their sovereign rights.

2. That the people of the respective States were as distinct from the people of the United States (referred to as the people in the aggregate) as if they were citizens of different countries in nowise dependent upon each other.

3. That the resolution adopted by congress, under which the convention was

held, did not confer upon it the power to change the structural formation of the State governments, which could only be effected by submitting such question to the people of the several States.

4. That the words "the people of the United States" mentioned in the preamble necessarily had reference to the people of the several States, as otherwise they would have stated an erroneous fact and would have been without force and effect as the powers of the convention were merely advisory and were exhausted when it proposed a constitution for ratification in the manner therein provided.

5. That even if all legislative, judicial and executive powers were conferred upon the general government, the people of the several States would not thereby be precluded from resuming them whenever they saw fit, unless they, also, surrendered their sovereignty.

6. That each State, at the time of the convention, possessed all the characteristics of a nation, one of which is that it may resume at pleasure all delegated powers, as its sovereignty would cease to exist the moment it recognized ultimate power in another.

Article 5 Inconsistent.—7. That article 5 is inconsistent with the theory that the States had surrendered their sovereign rights, and shows, beyond question, that ultimate power resided with the people of the several States, and not in the people of the United States. That they are the custodians of ultimate power is shown by the fact that, under said article, they can either amend the constitution by adding a provision that each State retains its right to secede or by adding a provision declaratory of the law at variance with any decision rendered by the supreme court of the United States or by striking out every provision of the constitution and inserting others wholly inconsistent with them, except the provision that no State, without its consent, shall be deprived of equal suffrage in the senate.

If it be said that this no longer presents a practical question, but is a mere sentiment, we deny such fact, but even if true, we answer, that sentiment has always played a conspicuous part in the history of the world, and that without sentiment, it would be like the play of Hamlet, with the Prince of Denmark left out.

Still a Live Question.—It was sentiment that caused a monument, after 2,000 years, to be erected to a brave soldier, which is thus beautifully described:

"In eastern France, on the line of the Lyons & Mediterranean railway, a traveler sees from the railway carriage, as he passes along, two or three miles to the south of him, on a hill, a colossal statue, standing with clear outlines against the pure blue sky.

"It is the statue of Cervingeterix, the Gallic chieftain, standing on the site of the ancient capital of his country. After 2,000 years have piled their oblivious sands above his memory, the patriotism of France has erected a monument, which touches the clouds to commemorate the deeds of a patriot who fought and died to save his people from the yoke of Rome."

It was sentiment that inscribed on the monument, erected to Leonidas and his brave comrades, these words:

"Go, stranger, and tell it at Lacedaemen that we died here in obedience to her laws."

It was sentiment that caused the people of the Southland to erect a statue to Jefferson Davis at Richmond, Va., because they love him and believe he was a hero.

JUDGE EUGENE GARY.

South Carolina.

INSURANCE—WAIVER.

STEPHENSON v. EMPIRE LIFE INS. CO.

Supreme Court of Georgia, November 15, 1912. Rehearing Denied, Dec. 13, 1912.

76 S. E. 592.

(Syllabus by the Court.)

Where a life insurance policy contained a stipulation that, "if any premium is not paid on or before the day it is due, or if any note or other obligation that may be accepted by the company for the whole or any part of the first or any subsequent premium or any other payment under this policy, be dishonored or not paid on or before the day when due, this policy shall, without any affirmative act on the part of the company or any of its officers or agents, be null and void except as herein provided," and the evidence on the trial showed that the insured was in life and failed to pay a note given for a portion of the first annual premium when the note became due, such failure worked a forfeiture of the policy.

(a) The condition set out in the preceding headnote was not waived by a demand made by the insurer after maturity of the note for its payment and the insured refused payment.

HILL, J.: The insured, Stephenson, received from the Empire Life Insurance Company a

contract of insurance on his life for $1,000, dated June 30, 1908. He gave his note for a part of the premium due on the policy, payable without grace on November 1, 1908. He died on March 18, 1909, without having paid the note. One of the terms of the contract of insurance was that "if any premium is not paid on or before the day it is due, or any note or other obligation that may be accepted by the company for the whole or any part of the first or any subsequent premium or any other payment under this policy, be dishonored or not paid on or before the day when due, this policy shall, without any affirmative act on the part of the company or any of its officers or agents, be null and void except as herein provided." The evidence shows that after the note became due, and while the insured was still in life, the defendant company made demands upon the insured for the amount due on the note, but the same was not paid. The following receipt was also offered and read in evidence: "Received from E. H. Stephenson of Chalybeate, Ga., the sum of seventy and 63/100 dollars, being the first annual premium on policy No. 12951, due on June 30, 1908, which pays the regular premium up to 30th day of June, 1909. This receipt to be valid must be signed by the president or secretary, and countersigned by an authorized agent of the company. Countersigned this 23d day of July, 1908. J. T. Tillman, Agent. Thos. M. Calloway, Secretary."

The controlling question in this case is whether the defendant, having issued its receipt, and the same having been accepted by the insured for the amount of the first annual premium on the policy, and the insurer having demanded the premium as evidenced by the note, after the note became due and before the death of the insured, was there a waiver of the condition in the policy that it should be void if any note given for the premium, or a part thereof, was not paid on or before the day it became due? A receipt is only prima facie evidence of payment, and may be denied or explained by parol. Civil Code, § 5795. The undisputed evidence is that the premium on the policy, as evidenced by the note or otherwise, was never paid. It is insisted that the note was taken in payment of the premium, as cash. But the policy by its very terms negatives the idea that the note was accepted as payment, whether paid or not. It is also argued that the insurance company, having endeavored to collect the note after it became due, and prior to the death of the insured, will be held to have waived the condition in the policy that the latter is void if the note be not paid on or before maturity. The reply to this contention is found in the case of Sullivan v. Connecticut Indemnity Ass'n., 101 Ga. 809, 29 S. E. 41, where this court held, on substantially the same facts as in this case, against this contention of the plaintiffs. It was there held: "(1) The evidence introduced by the plaintiff, on the trial of an action upon a policy issued by a life insurance association, showing that promissory notes given by the insured for the first premium on such policy had matured while he was in life, and that the same had never been paid, and the policy stipulating that 'no insurance shall take effect under this policy until the first payment hereby required is made during the lifetime and continued good health of the insured,' and also that 'in case any note, check or draft, given in payment or part payment of money due the association, shall not be paid at maturity, this policy lapses in the same manner as it would had the payment not been made when due,' there was no error in granting a nonsuit. (2) If, in a case of this kind, a demand upon the insured for payment of the premium notes after their maturity could, in any event, be treated as a waiver by the association of the foregoing stipulations, it certainly ought not to be so treated when payment is refused." To the same effect, in the case of National Life Ass'n. v. Brown, 103 Ga. 382, 29 S. E. 928 (1), it was held: "It being in a contract of life insurance stipulated that, 'if all stipulated payments or notes are not paid on or before the day when due, then, and in either event, this contract shall become null and void, and all moneys paid thereon shall be forfeited to the said association,' a failure by the insured to pay on or before its maturity a promissory note given for the first premium worked a forfeiture of the policy. And this is true although the company, through its agent, made an effort to collect the note but failed to do so." See, also, McCroskey v. Hamilton, 108 Ga. 640, 34 S. E. 111, 75 Am. St. Rep. 79; Neal v. Gray, 124 Ga. 510, 52 S. E. 622; Hipp v. Fidelity, etc., Ins. Co., 128 Ga. 491, 57 S. E. 892, 12 L. R. A. (N. S.) 319; Mutual Life Ins. Co. v. Clancy, 111 Ga. 865, 36 S. E. 941 (1); Reese v. Fidelity Mut. Life Ass'n., 111 Ga. 482, 36 S. E. 637; Mutual Reserve Fund Ass'n. v. Stephens, 115 Ga. 192, 41 S. E. 679. The above-cited cases are controlling. The writer has examined the records in the first two cases cited, and they cannot be distinguished in their facts from the present case. Mr. Cooley, in his Briefs on the Law of Insurance (page 2269f)

lays down the rule substantially in accord with our own decisions, as follows: "It is commonly stipulated by insurance companies that, if a note is accepted for a premium, a failure to pay the note at maturity shall terminate the insurance. When the policy, or the policy and the note, contain a stipulation to this effect, a failure to pay at maturity a note given for the premium will work a forfeiture of the insurance"—citing numerous authorities in support of the text.

Judgment affirmed.

NOTE.—*Waiver of Suspension Clause in Insurance Policies by Demanding Payment of Overdue Premium Notes.*—The question involved in the principal case seems by a curious kind of incidence to have arisen frequently in Georgia and Kentucky and hardly elsewhere, though there are some cases elsewhere, which by analogy are pertinent.

The instant case seems to us to be supported by the weight of authority, where language as unequivocal as that considered is found in the policy, instead of in a note for premium. But there is some authority against the position. Especially does decision in Kentucky run counter to the ruling in the principal case. Thus we find in Walls v. Home Ins. Co., 114 Ky. 611, 71 S. W. 650, 102 Am. St. Rep. 298, that insured was notified three times that an installment note was past due, to all of which notices he failed to respond until some nine months later, when he mailed a check to the agent of insurer. This check was never received, nor was it ever paid at bank. Four days later the house that was insured was burned. The court held that "retention of the note, and demand for its payment after maturity are acts inconsistent with an intention to insist on a continued forfeiture," and "therefore the forfeiture is to be deemed waived." It also said: "The conduct of insurer amounted to a waiver of the conditions of the policy providing for the suspension of its liability after default in the payment of the premium until the premium should be paid." The opinion refers to prior Kentucky ruling, but does not consider any cases from other states.

A very recent case decided by Kentucky Court of Appeals adheres to this doctrine and rules that where there was unconditional demands for payment which were not noticed, until one of them happened to reach insured while the barn which was the subject of insurance was being burned down. Straightway a check was sent but refused by insurer upon the ground that payment was made when the subject-matter of insurance was non-existent. Limerick v. Home Ins. Co., 150 S. W. 978. Especially was referred to the case of New England Life Insurance Co. v. Springgate, 129 Ky. 627, 112 S. W. 681, 19 L. R. A. N. S. 227, where there was a letter insisting on payment of the note. It was there said: "It (the company) treated the policy as in force, and took the risk of the assured being in good health. It cannot be allowed to withdraw the election it thus made, when it subsequently ascertained that the assured was then sick and afterwards died."

This case shows how very harsh was the ruling. An election, even if demanding payment of the past due note was an election, (which we dispute) ought not to be held unless it is made on a clear knowledge of existing circumstances. But it was not an election, but more a notice of the existence of a suspension expressly agreed to. Especially is this true where the policy stipulated that: "The company may collect, by suit or otherwise, any past due notes or installments and receipt for payment must be received by assured *before* there can be *revival of the policy.*" Here the policy expressly agrees there may be collection even by suit and it to be actually made before *"revival"* is effected.

An Illinois case has been cited as supporting the Kentucky view, but rightly considered, it is against it, because the assured did give to the agent of insurer valuable security for the payment of an overdue note and there was thought to be evidence for the jury that this agent was notified that by this giving of security the assured was relying on the continued existence of the policy. Union Cent. L. Ins. Co. v. Burnett, 136 Ill. App. 187.

In Washburn v. Union Cent. L. Ins. Co., 143 Ala. 485, 38 So. 1011, it was said there was a forfeiture clause for non-payment of the note. Under this kind of provision it was said that demand for the note's payment "was an election by the insurer to treat the policy as subsisting and valid, and amounted to a waiver of the forfeiture." That ruling does not seem at all to cover such a clause as was involved in the Kentucky cases. The policies there said that though suit were brought, this did not avoid suspension of vitality until the note was actually paid.

In Galliher v. State Mutual L. Ins. Co., 150 Ala. 543, 43 So. 833, the stipulation for forfeiture was in the note and not in the policy and it merely provided for forfeiture and not suspension while the note remained unpaid. The Alabama court cites as its main reliance the Kentucky cases, and we believe they are not strictly in point. But whether in point or not they are the basis of the Alabama holding.

As supporting the principal case are Iles v. Mut. R. L. Ins. Co., 50 Wash. 49, 96 Pac. 522, 18 L. R. R., N. S. 902; Linn v. N. Y. L. Ins. Co., 78 Mo. App. 192; Ware v. Millville M. M. & F. Ins. Co., 45 N. J. L. 177; Cohen v. Continental F. Ins. Co., 67 Tex. 325, 3 S. W. 296, 60 Am. Rep. 24; Iowa L. Ins. Co. v. Lewis, 187 U. S. 335, and Georgia cases cited in the opinion in the principal case.

It would seem that contrary opinion is either confined solely to Kentucky or there and such cases as pointedly base themselves on Kentucky decision. The sum and substance of Kentucky decision is really to refuse to allow insurers to enforce unambiguous contracts, all that is said about election being merely a begging of the real question involved. C.

HUMOR OF THE LAW.

"Why do you want a new trial?"

"On the grounds of newly discovered evidence, your honor."

"What's the nature of it?"

"My client dug up $400 that I didn't know he had."—Washington Herald.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Bailment**—Lien.—One does not waive his common-law lien for repairs on an engine by delivering the engine to an express company to carry to the owner; such company being the shipper's agent.—Pacific Aviation Co. v. Wells-Fargo & Co., Ore., 128 Pac. 438.

2. **Bankruptcy**—Amendment.—A creditor, who filed a claim for a book account, held entitled to file an amended claim after expiration of a year, based on promissory notes covering the same account, under the facts shown.—Brown v. O'Connell, C. C. A., 200 Fed. 229.

3.——Burden of Proof.—Presentation of a note, accompanied by a duly verified claim, to a referee in bankruptcy, constitutes a prima facie case, and shifts the burden of proof to an objecting creditor.—In re Schwarz, U. S. D. C., 200 Fed. 309.

4.——Concealing Assets.—Where a bankrupt did business through a corporation, which was merely a form of business activity, a concealment of assets belonging to him was sufficient to sustain an objection to his discharge, though the assets were first applicable to the creditors of the corporation.—In re Berger, U. S. D. C., 200 Fed. 325.

5.——Payment.—Where, after receiving a deposit to the credit of the bankrupt's account, the bank closed the account and applied the balance to the bankrupt's indebtedness to it, the deposit so made constituted a payment pro tanto, and not a deposit.—Ernst v. Mechanics' & Metals Nat. Bank of New York, U. S. D. C., 200 Fed. 295.

6.——Preference.—Payments made out of a bankrupt's deposit account to the bank to settle maturing discounts in good faith held not recoverable by the trustee as a preference; no deposits having been made after threatened insolvency.—Studley v. Boylston Nat. Bank of Boston, C. C. A., 200 Fed. 249.

7.——Preference.—Payment received by a judgment creditor of a bankrupt in good faith pursuant to a contemplated compromise, which failed because of the bankrupt's insanity, held not recoverable as a preference.—Templeton v. Wollens, C. C. A., 200 Fed. 257.

8.——Res Judicata.—Pendency of bankruptcy proceedings, unknown to any of the parties concerned or to the court, does not prevent a territorial court having custody of perishable property under an attachment from ordering a sale, where the interests of the parties to the action required the sale.—Jones v. Springer, 33 Sup. Ct. Rep. 64.

9.——Trust.—The making of a clearance loan by a bank to stockbrokers on the day they became bankrupt held not to create a trust of the funds loaned, in the absence of an agreement that such should be its effect.—Hotchkiss v. National City Bank of New York, U. S. D. C., 200 Fed. 287.

10. **Banks and Banking**—Depositor.—When a depositor learned of the sale of a private bank he could either refuse to accept the purchasers as his debtors or could affirm the sale, and look to the purchasers for payment.—Gillett v. Ivory, Mich., 139 N. W. 53.

11. **Bills and Notes**—Failure of Consideration.—That the consideration of a note is set out on its face does not carry notice of failure of consideration, and one who buys the note in good faith, for value, and before maturity is not bound to make inquiry whether there is a failure of consideration.—Citizens' Bank of Vidalia v. Greene, Ga., 76 S. E. 795.

12.——Pleading.—In an action on a note, brought by the payee, or one who is not a holder in due course, a partial failure of consideration may be shown under an answer which pleads a total failure of consideration.—McMillan v. Gardner, Kan., 128 Pac. 391.

13. **Breach of Marriage Promise**—Damages.—In an action for breach of marriage contract, the jury in arriving at the damages may consider defendant's financial condition, and plaintiff's loss of social position, luxuries, comforts, and other things incidental to marriage to a man of means.—Houser v. Carmody, Mich., 139 N. W. 9.

14. **Brokers**—Fraud.—Right to commission may not be defeated by the fraudulent act of the owner in withdrawing the property from the broker prior to the making of a contract.—Anderson v. Crow, Tex., 151 S. W. 1080.

15. **Carriers of Goods**—Furnishing Cars.—Where a railroad divides mines along its line into two districts, and rates them according to their producing capacity, and during a period of shortage gives to one coal company an excess of cars, it will be liable in damages to a coal company in the other district which has been deprived of its fair share of cars.—Puritan Coal Mining Co. v. Pennsylvania R. Co., Pa., 85 Atl. 426.

16.——Limiting Liability. — The Carmack Amendment to the Hepburn Act does not pre-

vent a carrier from making valid contracts limiting liability, according to the agreed value, upon interstate shipments under legal tariff rates.—Carpenter v. United States Express Co., Minn., 139 N. W. 154.

17. **Carriers of Live Stock**—Caretaker.—A caretaker, accompanying a shipment of cattle and riding on the cattle train, is a passenger for hire, to whom the carrier owes the highest degree of care consistent with the practical operation of such train.—Chicago, B. & Q. Ry. Co. v. Williams, C. C. A., 200 Fed. 207.

18.——Notice of Claim.—Stipulations in a contract for the carriage of live stock, requiring written notice of a claim for damages before the stock is removed, and that a failure to comply shall bar any recovery, are valid.—Atchison, T. & S. F. Ry. Co. v. Baldwin, Colo., 128 Pac. 449.

19. **Carriers of Passengers**—Evidence.—Violated rules of a carrier for the regulation of the conduct of employees are not admissible in evidence to show liability for negligence to third persons, who were ignorant thereof, and did not rely thereon.—Hoffman v. Cedar Rapids & M. C. Ry. Co., Iowa, 139 N. W. 165.

20.——Fress Passes.—The Legislature has power to prohibit the giving of free passes by common carriers.—Schulz v. Parker, Iowa, 139 N. W. 173.

21.——Leased Track.—Where the trains of one railroad company were run over tracks leased from a second, and the tracks were jointly used by the lessee and a third company, all three companies are liable as principals to passengers injured by the act of a switchman of the third company in opening a switch under a train of the lessee.—Chicago, St. L. & N. O. R. Co. v. Rowell, Ky., 151 S. W. 950.

22. **Charities**—Defined.—Any gift not inconsistent with law and promotive of the amelioration of the condition of mankind or the diffusion of useful knowledge is a "charity."—Strother v. Barrow, Mo., 151 S. W. 960.

23. **Chattel Mortgages**—Conversion.—One converting to his own use mortgaged chattels is only liable to the mortgagee for their market value at the time and place of conversion, and, where the value exceeds the debt, then only to the extent of the debt.—Johnson v. Oswald, Tex., 151 S. W. 1164.

24. **Common Carriers**—Interstate.—A corporation maintaining a stockyard which operates a railroad system for cars to and from trunk lines in the course of their transportation from beyond the state is an interstate railway carrier.—United States v. Union Stockyard & Transit Co. of Chicago, 33 Sup. Ct. Rep. 83.

25. **Constitutional Law**—Citizenship.—A corporation cannot claim the protection of Const. U. S. Amend. 14, securing privileges and immunities of citizens of the United States against abridgment by laws of a state.—Selover, Bates & Co. v. Walsh, 33 Sup. Ct. Rep. 69.

26.——Classification.—The policy of classification, subject to constitutional limitations, is within the legislative discretion, and can never become a judicial question except to determine whether any legislative action passes the boundaries of reason, resolving reasonable doubts in the negative.—Maercker v. City of Milwaukee, Wis., 139 N. W. 199.

27.——Franchises.—Rights granted by a street car franchise and accepted could not be abridged by subsequent legislation or ordinances.—City of Detroit v. Detroit United Ry., Mich., 139 N. W. 56.

28.——Liberty of Contract.—Liberty to contract is not abridged in violation of Amend. 14, by provision of Laws S. D. 1907, c. 131, punishing the selling of goods at a lower rate in one place than in another, to destroy competition.—Central Lumber Co. v. State of South Dakota, 33 Sup. Ct. Rep. 66.

29. **Contempt**—Habeas Corpus.—Where judgment in habeas corpus requires grandparents to surrender a child to its father at stated intervals, and they refuse, the court has the power to punish them for contempt.—Crawford v. Manning, Ga., 76 S. E. 771.

30.——Record.—Where commitment is made for contempt committed in open court, the only record required is the order of commitment, which should state fully the facts constituting the offense.—People v. Hogan, Ill., 100 N. E. 177.

31. **Contracts**—Consideration.—A contract between a corporation, organized to promote the interests of tobacco growers, and a grower, whereby the corporation is made the sole agent of the grower to receive, grade, and sell the tobacco, held supported by an adequate consideration.—Burley Tobacco Society v. Gillaspy, Ind., 100 N. E. 89.

32.——Public Policy.—An agreement by a judgment creditor to subject to her judgment a less interest in land than might have been subjected in consideration of the other party refraining from bidding at the sale under the judgment held not invalid as being against public policy.—Lay v. Brown, Ark., 151 S. W. 1001.

33.——Public Policy.—An agreement by defendant to sell to plaintiff the property purchased at a public sale at the amount of defendant's bid and an additional sum if plaintiff stopped bidding thereon held unenforceable as contra bonos mores.—Owens v. Wright, N. C., 76 S. E. 735.

34.——Public Policy.—An agreement by a parent to emancipate his minor children, so as to relieve himself of their support for necessaries, is contrary to public policy.—Snell v. Ham, Tex., 151 S. W. 1077.

35.——Public Policy.—The test of the validity of an agreement to share the emoluments of a public office is its tendency to injure the public, and not whether the public would be actually harmed thereby.—Anderson v. Branstrom, Mich., 139 N. W. 40.

36. **Corporations**—By-Laws.—An innocent stranger dealing with a corporation through its executive and managing officers is not affected by any limitation of the officer's authority contained in by-laws of which he has no knowledge.—Western Investment & Land Co. v. First National Bank, Colo., 128 Pac. 476.

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38.——Extra Services.—The claim of a president of a public service corporation for extra services, even if agreed to, has no priority over mortgage bondholders on its insolvency.—Title Ins. & Trust Co. v. Home Telephone Co. of Puget Sound, U. S. D. C., 200 Fed. 263.

39.——General Manager.—A "general manager" is defined to be a person who has the most general control over the affairs of a corporation, and who has knowledge of all its business and property, and can act in emergencies on his own responsibility.—Manross v. Uncle Sam Oil Co., Kan., 128 Pac. 385.

40.——Sale of Stock.—On the question of fraudulent representations, on the sale of stock, as to the net assets of the corporation, neither the value of its assets several years later nor their earning capacity during a series of years, the representation having been as to "net assets" exclusive of "good will," is admissible.—Hubbard v. Oliver, Mich., 139 N. W. 77.

41. **Criminal Law**—Flight.—Flight or concealment after a homicide raises no presumption of law as to the guilt of accused.—State v. Tate, N. C., 76 S. E. 713.

42. **Damages**—Elements of.—In determining damages for personal injuries, the jury may consider a servant's loss of time, any impairment of his ability to work, his disfigurement and pain, past or future, and should deduct disbursements under a release which the jury set aside.—Southwestern Brewery & Ice Co. v. Schmidt, 33 Sup. Ct. Rep. 68.

43. **Dedication**—Vacation.—Where one dedicates a street within his land, but forming the boundary thereof, he owning nothing beyond, the fee to the entire street remains in him, so that on its vacation all of it belongs to him, or, he having conveyed all his land abutting on it, to his grantee.—Rowe v. James, Wash., 128 Pac. 539.

44. **Divorce**—Control Over Residents.—Every state may enact laws which will personally bind its citizens while sojourning in a foreign jurisdiction, and declare that marriages between its citizens in foreign states in disregard of the statute of the state of their domicile will not be recognized in the courts of the latter state, though valid where celebrated.—Wilson v. Cook, Ill., 100 N. E. 222.

45.——Impotency.—To obtain a divorce on the ground of impotency, the defect must have existed at the time of marriage and be incurable. Kiskaid v. Kinkaid, Ill., 100 N. E. 217.

46.——Separation by Consent.—There can be no desertion where the separation of spouses is upon mutual consent.—Summers v. Summers, Ind., 100 N. E. 71.

47. **Easements**—How Acquired.—A private way over the land of another may be acquired by adverse user, provided the use has been for the statutory period of seven years under a claim of right, openly, continuously, and adversely.—Medlock v. Owen, Ark., 151 S. W. 995.

48. **Electricity**—Broken Wire.—One walking on a city highway seeing a broken electric wire on the sidewalk with nothing to indicate that it is a live wire is not necessarily guilty of contributory negligence in voluntarily picking it up to throw it out of his way.—Southern Bell Telephone & Telegraph Co. v. Davis, Ga., 76 S. E. 786.

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50. **Evidence**—Admissibility.—Evidence of a separate oral agreement between the parties to a written contract as to matters on which the contract is silent, if it does not tend to vary or contradict the terms of the writing, is admissible.—Wehnes v. Roberts, Neb., 139 N. W. 212.

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54.——Photograph.—Photograph, which a competent witness stated to be a correct representation of the objects shown, held admissible, though not vouched for by the photographer.—Temple v. Gilbert, Conn., 85 Atl. 380.

55.——Res Gestae.—In an action for personal injuries caused by the negligence of defendant's employee, what the employee said and did immediately before and at the time of the injury was admissible in evidence.—Johnson v. E. C. Clark Motor Co., Mich., 139 N. W. 30.

56.——Similar Circumstances.—In an action on a written instrument defended on the ground of fraudulent representations, the testimony of a witness as to similar representations to induce him to sign a similar writing was competent.—McLaughlin v. Thomas, Conn., 85 Atl. 370.

57. **Exchange of Property**—Trover.—Where one is induced to trade a mule for a horse on a false representation that the horse is sound, when in fact it is unsound and worthless, no title to the mule passes; and the owner can recover it in trover, and also a note given for part of the price.—Davis & Co. v. Preston, Ga., 76 S. E. 766.

58. **Exemptions**—Statutory Construction.—Exemption statutes are to be liberally construed and effect given to the legislative intent, though seemingly contrary to the letter of other statutes.—Rindles v. Bordewyk, S. D., 139 N. W. 113.

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63.——Liability.—Knowledge of their falsity by one making representations is not necessary to his liability.—Hubbard v. Oliver, Mich., 139 N. W. 77.

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71.——Wife's Services.—The damages recoverable by a husband for injuries to his wife include the value of her wifely services or consortium between her injury and death.—Indianapolis & M. Rapid Transit Co. v. Reeder, Ind., 100 N. E. 101.

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77.——Vexatious Litigation.—Where an action begun and ready for trial is dismissed by plaintiff and immediately recommenced and again dismissed by plaintiff, another action for the same cause against the same parties should be enjoined in the absence of evidence of good faith of plaintiff.—Shevalier v. Stephenson, Neb., 139 N. W. 233.

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82.——Mutual Assessment.—Mutual assessment fire insurance companies have no capital stock, the policy holders being the stockholders, and the cash paid in and the premium notes constituting the company's assets; and hence, upon the insolvency of such company, a policy holder cannot recover premiums paid in or avoid premium notes.—Gleason v. Prudential Fire Ins. Co., Tenn., 151 S. W. 1030.

83.——Waiver.—Where an agent had authority to issue a policy, and had notice that the insured did not own the lots where the property was situated, this was notice to the company; and the issuance of the policy and acceptance of the premium waived a provision that the insured should be the owner of the lots.—Rochester German Ins. Co. of Rochester, N. Y., v. Rodenhouse, Okla., 128 Pac. 508.

84. **Judgment**—Evidence.—As a general rule, until a judgment becomes final by affirmance, or by the lapse of the time within which to appeal, it is not admissible in evidence, and cannot be relied on as the foundation of rights declared in it.—Sewell v. Price, Cal., 128 Pac. 407.

85.——Expunging.—A void judgment may be expunged on motion at any time, irrespective of the rule regarding the vacating of a judgment for mere irregularity.—Godfrey v. Wright, Wis., 139 N. W. 193.

86.——Setting Aside.—Where a default judgment was entered on a substituted complaint, which was, in effect, a new cause of action, the judgment should be set aside.—Gallup v. Thomas B. Jeffery Co., Conn., 85 Atl. 374.

87. **Landlord and Tenant**—Defective Premises.—A tenant who knows of the defective condition of the premises, or who may have known thereof by a reasonable inspection, may not recover from the landlord for injuries sustained in consequence thereof.—Andonique v. Carmen, Ky., 151 S. W. 921.

88.——Estoppel.—Where a landlord indebted to a subtenant in excess for the rent agreed to accept his order for the rent, but after the maturity of the rent refused to do so, but not on the ground that it had not been given on the day of the maturity, he waived the right to forfeit the lease for nonpayment of rent.—Linn Woolen Co. v. Brown, Me., 85 Atl. 404.

89. **Libel and Slander**—Bill of Particulars.—The court has power to require defendant to file a bill of particulars in an action for a libelous publication.—Irwin v. Taubman, S. D., 139 N. W. 115.

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92. **Malicious Prosecution** — Damages.—The circumstances of aggravation, bodily pain, mental anguish, and injury to reputation, and expenses of litigation less taxable costs, are proper elements of damages for malicious prosecution.—Seidler v. Burns, Conn., 85 Atl. 369.

93. **Marriage**—Common Law Marriage.—A common-law marriage is established, where what is done and said evidences an intention by the parties to assume the marriage status, and the parties thereupon enter into the relation of husband and wife.—Herald v. Moker, Ill., 100 N. E. 277.

94. **Master and Servant**—Warning.—Where a master orders his servant into a particular place to do work, which will be rendered dangerous if machinery be without notice set in motion, the master owes the duty of exercising reasonable care in protecting the servant from harm.—Kempfert v. Gas Traction Co., Minn., 139 N. W. 145.

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97.——Deficiency Judgment.—Where the original decree in foreclosure against a mortgagor and a junior mortgagee did not provide for a deficiency judgment in favor of the junior mortgagee, it was error to render such judgment on motion, after the sheriff reported a deficiency as to the amount due such mortgagee.—Godfrey v. Wright, Wis., 139 N. W. 193.

98.——Laches.—As regards laches, in delaying action to have a deed declared a mortgage and released, it is sufficient excuse that defendant has repeatedly exonerated plaintiff from obligation to make payment on the indebtedness and requested him not to make further payments.—Todd v. Todd, Cal., 128 Pac. 413.

99. **Navigable Waters**—Accretions.—In case of accretions, where the shore line is not irregular, they should be apportioned by giving to each section a proportion of the outer boundary line of the accretions in the ratio that the old shore line, on the particular section, bore to the whole of the old shore line, and though the main stream has gone west of the new shore line, leaving only a chute dividing the accretions from a former island in the river, the measurements must be made from such chute as the new shore line.—Reeves v. Moore, Ark., 151 S. W. 1025.

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104. **Parent and Child**—Necessaries.—Where plaintiff's minor child was hired by defendant, small sums of money furnished by defendants without objection by plaintiff can be credited against his wages where reasonably necessary and when no such provision was made by plaintiff.—Freeman v. Shaw, Mich., 139 N. W. 66.

105. **Partition**—Contempt.—Where a purchaser in partition refuses to perform, the court may enforce specific performance by contempt proceedings, and is not limited to a resale at the bidder's risk.—Wakefield v. Wakefield, Ill., 100 N. E. 275.

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110.——Dual Agency.—Either principal without showing injury to himself may avoid a contract made by a dual agent without his knowledge of such dual agency.—Guthrie v. Huntington Chair Co., W. Va., 76 S. E. 795.

111. **Principal and Surety**—Conditional Signing.—One signing a mortgage note as surety could, as a condition to signing, require payee to agree to have the insurance on the mortgaged property continued in force until the note was paid.—Clare County Savings Bank v. Featherly, Mich., 139 N. W. 61.

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115.——Burden of Proof.—Where plaintiff's father, by written memorandum, proposed and intended to convey one-half of a lot to plaintiff, and the other half to defendant, and defendant induced his father to convey to him the land intended for plaintiff, and did not sustain the burden of showing that he was authorized to make such inducements, he held one-half of the lot in trust for plaintiff.—Carson v. Carson, Ill., 100 N. E. 263.

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Central Law Journal.

A LEGAL WEEKLY NEWSPAPER
Published by

Central Law Journal Company

420 MARKET STREET, ST. LOUIS, MO.

To whom all communications should be addressed.

Subscription price, Five Dollars per annum, in advance. Subscription price, including two binders for holding two volumes, saving the necessity for binding in book form, Six Dollars. Single numbers, Twenty-five Cents.

Entered at the Post-Office, St. Louis, Mo., as second-class matter.

NEEDHAM C. COLLIER, EDITOR-IN-CHIEF
ALEXANDER H. ROBBINS, MANAGING EDITOR

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